

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Michael Antwan Sheppard, #280508;)	C/A No. 3:09-2529-CMC-JRM
)	
Plaintiff,)	
)	REPORT AND RECOMMENDATION
v.)	
)	
Robert M. Stewart, SLED;)	
Mary C. Perry, SLED,)	
)	
Defendants.)	
_____)	

Michael Antwan Sheppard (Plaintiff) files this civil action *pro se* and *in forma pauperis* under 28 U.S.C. § 1915.¹ Plaintiff currently is confined at Perry Correctional Institution, a facility of the South Carolina Department of Corrections. This complaint is construed as an action seeking relief under the federal Freedom of Information Act (FOIA). *See* 5 U.S.C. § 552 *et seq.* Plaintiff names Robert M. Stewart and Mary C. Perry, of the South Carolina Law Enforcement Division (SLED) as defendants.² Plaintiff seeks injunctive relief.

Pro Se and In Forma Pauperis Review

Under established local procedure in this judicial district, a careful review has been made of this *pro se* complaint pursuant to the procedural provisions of 28 U.S.C. §§ 1915 and 1915A. This review has been conducted in light of the following precedents: *Neitzke v. Williams*, 490 U.S.

¹Pursuant to the provisions of 28 U.S.C. § 636(b)(1), and Local Rule 73.02(B)(2)(e) D.S.C., the undersigned is authorized to review such complaints for relief and submit findings and recommendations to the District Court.

²Title 28 U.S.C. § 1915A (a) provides that “[t]he court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.”

319, 324-25 (1989); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Haines v. Kerner*, 404 U.S. 519 (1972); and *Gordon v. Leeke*, 574 F.2d 1147 (4th Cir.). This Court is required to liberally construe *pro se* documents, *Erikson v. Pardus*, 551 U.S. 89 (2007); *Estelle v. Gamble*, 429 U.S. 97 (1976), holding them to a less stringent standard than those drafted by attorneys, *Hughes v. Rowe*, 449 U.S. 9 (1980).

Even under this less stringent standard, however, the *pro se* complaint is subject to summary dismissal. The mandated liberal construction afforded to *pro se* pleadings means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so. However, a district court may not rewrite a petition to include claims that were never presented, *Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999), or construct the plaintiff's legal arguments for him, *Small v. Endicott*, 998 F.2d 411, 417-18 (7th Cir. 1993), or “conjure up questions never squarely presented” to the court, *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985). The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court. *Weller v. Dep’t of Soc. Serv.*, 901 F.2d 387 (4th Cir. 1990).

This complaint has been filed pursuant to 28 U.S.C. § 1915 which permits an indigent litigant to commence an action in federal court without prepaying the administrative costs of proceeding with the lawsuit. To protect against possible abuses of this privilege, the statute allows a district court to dismiss the case upon a finding that the action “fails to state a claim on which relief may be granted” or is “frivolous or malicious.” 28 U.S.C. § 1915(e)(2)(B)(i), (ii). Under § 1915(e)(2)(B), a claim based on a meritless legal theory may be dismissed *sua sponte*. *Neitzke v. Williams*, 490 U.S. 319 (1989); *Allison v. Kyle*, 66 F.3d 71 (5th Cir. 1995). A finding of frivolity can be made where the complaint “lacks an arguable basis either in law or in fact.” *Denton v.*

Hernandez, 504 U.S. 25, 31 (1992). The court may dismiss a claim as “factually frivolous” under § 1915(e) if the facts alleged are clearly baseless. *Id.* at 32. In making this determination, the court is not bound to accept without question the truth of the plaintiff’s allegations, but rather need only weigh the plaintiff’s factual allegations in his favor. *Id.*

Discussion

The complaint filed in this case is sparse. However, Plaintiff claims that he has requested lab results from the defendants and has paid the necessary fee, but has not received the results or any response to his inquiries. On the face of the complaint, Plaintiff state that one of the defendants is an FOIA compliance officer, which leads this Court to construe this complaint as one seeking federal FOIA relief. This complaint should be dismissed.

Plaintiff is not entitled to relief under the federal FOIA. The federal FOIA is applicable to agencies or departments of the Government of the United States, and is not applicable to agencies or departments of a State. *See* 5 U.S.C. § 551(1); *see also Grand Cent. Partnership, Inc. v. Cuomo*, 166 F.3d 473, 484 (2d Cir. 1999) (“it is beyond question that FOIA applies only to federal and not to state agencies”); *Philip Morris, Inc., v. Harshbarger*, 122 F.3d 58, 83 (1st Cir. 1997) (“FOIA . . . applies only to federal executive branch agencies”); *St. Michael's Convalescent Hosp. v. California*, 643 F.2d 1369, 1373 (9th Cir. 1981) (definition of “agency” under FOIA “does not encompass state agencies or bodies”); *Johnson v. Wells*, 566 F.2d 1016, 1018 (5th Cir. 1978) (state board of parole not agency within meaning of FOIA). Therefore, Plaintiff’s federal FOIA claim against the defendants should be summarily dismissed because it fails to state a cognizable claim.³

³The State of South Carolina has a Freedom of Information Act which applies to state agencies. *See* S.C. Code Anno. § 30-4-10, *et seq.* (1976); *see also Seago v. Horry County*, 663 S.E. 2d 38 (S.C. 2008).

Recommendation

Accordingly, it is recommended that the District Court dismiss the complaint in the above-captioned case *without prejudice* and without issuance and service of process. *See* 28 U.S.C. § 1915A (as soon as possible after docketing, district courts should review prisoner cases to determine whether they are subject to summary dismissal).



Joseph R. McCrorey
United States Magistrate Judge

October 20, 2009
Columbia, South Carolina

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Court Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. In the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must “only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.” *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005).

Specific written objections must be filed within ten (10) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The time calculation of this ten-day period excludes weekends and holidays and provides for an additional three (3) days for filing by mail. Fed. R. Civ. P. 6(a) & (e). Filing by mail pursuant to Fed. R. Civ. P. 5 may be accomplished by mailing objections to:

Larry W. Propes, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).